Supreme Court, U. S.
APR 10 1975

# APPENDIX

## Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-5566**

PEARL BARRETT,

*Petitioner,*

—v.—

THE UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

# Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## RELEVANT DOCKET ENTRIES

| Date Filed | Pleading |
|---|---|
| 6-12-72 | Indictment |
| 10-24-72 | Order: Counsel appointed |
| 10-25-72 | Order: On 10-24-72 defendant entered plea of not guilty. |
| 11- 1-72 | Order: On 10-25-73 defendant moved Court to Dismiss Indictment; parties to file briefs in support of their positions; case continued for trial until 11-6-72 at 9:30 A.M.; counsel for defendant authorized to incur travel expense & to subpoena witnesses at cost of the U.S. if it appears an evidentiary hearing is warranted. |
| 11- 3-72 | Defendant's Memorandum Brief |
| 11- 3-72 | Plaintiff's Memorandum of Law |
| 11- 7-72 | Order: On 11-6-72 hearing on defendant's motion to quash Indictment; motion overruled. |
| 11- 8-72 | Agreed Order: Trial continued to 5-21-73 |
| 5-24-73 | Order: On 5-23-73 jury trial begun but not concluded; recessed until 5-24-73 at 9:30 A.M. |
| 5-25-73 | Order: On 5-24-73 jury trial resumed & concluded; Verdict: Guilty. |
| 6-11-73 | Acknowledgment of Court's Advice of Right to Appeal |
| 6-11-73 | Judgment & Commitment: On 6-11-73 at Pikeville, defendant sentenced to 3 years under provisions of Title 18, Section 4208(a)(2), USC. |
| 6-19-73 | Notice of Appeal |
| 6-19-73 | Designation of Record on Appeal |

| Date Filed | Pleading |
|---|---|
| 7- 6-73 | Motion of plaintiff for return of .32 caliber Smith & Wesson pistol used in commission of the crime herein. |
| 7- 9-73 | Order: Motion of plaintiff for return of .32 caliber Smith & Wesson pistol used in commission of the crime herein passed pending adjudication of merits of this case upon appeal. |
| 7-19-73 | Copy of Judgment & Commitment: On 7-12-73 defendant delivered to Springfield, Mos. Hosp. F.P. at Springfield, Mo. |
| 7-24-73 | Order: Extends time for completion of transcript until 8-28-73 & defendant shall have until 8-28-73 to file record on appeal. |
| 7-24-73 | Affidavit of Official Court Reporter |
| 8-23-73 | Reporter's Official Transcript of Proceedings at Hearing |
| 8-23-73 | Reporter's Official Transcript of Proceedings at Trial |
| | Envelope of plaintiff's exhibit #1. Plaintiff's exhibits 2 and 3 too bulky for mailing. |
| | Envelope of defendant's exhibit 1 |

UNITED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY

I, Davis T. McGarvey, Clerk of the United States District Court for the Eastern District of Kentucky do hereby certify that the foregoing is the original record on appeal and relevant docket entries in the case of United States of America, plaintiff, versus Pearl Barrett, defendant, Criminal Action No. 10,339 on the Jackson Docket.



IN TESTIMONY WHEREOF, I have herewith subscribe my name and affixed the seal of the aforesaid Court of Lexington, this 28th day of August, 1973.

DAVIS T. MCGARVEY, Clerk
United States District Court

By: /s/ Julia A. Wallace
D. C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON DIVISION

No. 10,339

THE UNITED STATES OF AMERICA

*vs.*

PEARL BARRETT

INDICTMENT

T. 18, Sec. 922(h), USC—Knowingly received and possessed a firearm in commerce after having been convicted of a felony.

1 Count.

A true bill,

/s/ [Illegible]
Foreman.

Filed in open court this ——— day of ————————, A. D. 19—.

————————————
Clerk.

Bail, $————————

[Filed June 12, 1972, Eastern District of Kentucky, at Catlettsburg, Davis T. McGarvey, Clerk, U.S. District Court]



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

(Title 18, Sec. 922(h), USC)

[Filed June 12, 1972, Eastern District of Kentucky, at Catlettsburg, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

*vs.*

PEARL BARRETT

THE GRAND JURY CHARGES:

That on or about the 1st day of April, 1972, in Owsley County, in the Eastern District of Kentucky,

PEARL BARRETT

having been convicted of a felony by a court of the Commonwealth of Kentucky, that is, the Madison Circuit Court, of housebreaking on or about January 17, 1967, knowingly received and had in his possession a firearm, to wit, a .32 caliber Smith & Wesson revolver, model 31-1, serial number H33141, which had been transported in interstate commerce.

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

[Filed May 24, 1973, Eastern District of Kentucky, at Jackson, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

*v.*

PEARL BARRETT

VERDICT

We, the Jury, find the defendant Guilty.

May 24, 1973
(Date)

/s/ Chas. H. Tirey
(Foreman)



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

Criminal No. 10,339

[Filed May 25, 1973, Eastern District of Kentucky, at Jackson, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

PEARL BARRETT, DEFENDANT

ORDER

On May 24, 1973 came the United States by Assistant United Attorney, Eldon Webb, the defendant in person and his attorney, Harold Garland Wells, and the jurors present as on May 23, 1973.

On motion of counsel for the defendant the rule as to separation of witnesses was invoked and all witnesses were excluded from the courtroom with the exception of Agent Walter Huffman, who was allowed to remain at counsel's table to assist the United States in the presentation of the case.

Mr. Webb read the Indictment to the jury and made an opening statement on behalf of the United States. Mr. Wells reserved an opening statement for the defendant.

The introduction of evidence on behalf of the United States was begun and concluded.

The hour for noon recess having arrived, the Court admonished the jurors and a recess until 12:30 P. M. was announced.

Following the recess came the United States attorneys, the defendant, nis attorney in the absence of the jury and testimony was had on behalf of the defendant.

Later, the jury returned into open court and Mr. Wells made an opening statement on behalf of the defendant.

Thereupon evidence on behalf of the defendant was introduced and concluded.

Closing arguments were made to the jury by Mr. Wells for the defendant and by Mr. Webb for the United States.

The Court instructed the jurors and after the discharge of the alternate juror, the jury retired to the juryroom to consider the case.

Later, the jury returned into open court and in the presence of the attorney for the United States, the defendant, his attorney reported its verdict to-wit:

"We, the Jury, find the defendant Guilty

May 24, 1973

/s/ Chas. H. Tirey,
(Foreman)"

Thereupon the Court inquired of counsel for the United States and counsel for the defendant if there was any question as to the form of the verdict, and counsel for both the plaintiff and the defendant having answered in the negative, thereupon the jury was discharged.

It was ORDERED that sentencing be deferred until June 11, 1973 at 9:30 A. M. at PIKEVILLE and the defendant's bond is to remain in full force and effect for appearance at Pikeville on June 11, 1973.

May 24, 1973

/s/ H. David Hermansdorfer
H. DAVID HERMANSDORFER,
Judge

Copies: U. S. Attorney
Harold Garland Wells
5/25/73

/s/ M.F.B.



UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

[Filed June 11, 1973, Eastern District of Kentucky, at Pikeville, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

*v.*

PEARL BARRETT

JUDGMENT AND COMMITMENT

On this 11 day of June, 1973 at Pikeville came the attorney for the government and the defendant appeared in person and by Harold Garland Wells, heretofore appointed by the Court to represent him.

IT IS ADJUDGED that the defendant has been convicted upon verdict of guilty of the offense of Receiving and possessing firearm transported in interstate commerce, having been convicted of a felony in violation of Title 18, section 922(h), United States Code and the court having asked the defendant whether as charged in the indictment he or his attorney has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon the Probation Officer submitted a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for a period of Three (3) Years—Provisions of Title 18, Section 4208(a)(2), United States Code.

IT IS ADJUDGED that the defendant be imprisoned until he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

June 11, 1973.

/s/ H. David Hermansdorfer,
United States District Judge

The Court recommends commitment to: _____
_____.

(Signed) _____ (By) _____
Deputy Clerk





[55] Ladies and gentlemen, while you are out of the courtroom, remember the admonition of the Court.

(A recess was had from 10:45 a.m. to 10:55 a.m.)

(The following proceedings were had in chambers)

MR. WELLS: Comes the defendant by counsel at the close of the Government's case and moves the Court to direct a verdict of acquittal for the defendant on the grounds that the Government has failed to prove a case under the provisions of Title 18 USC, 922(g) and (h), particularly, 922(h), which is the statute upon which the Government is prosecuting in this case. The motion is based on the authority of the Supreme Court case decision in the United States of America vs. Bass, which bears the citation 404 US, 342. In this opinion the Supreme Court states in part, (reading) However, Title IV apparently does not reach possessions or interstate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate [56] transportation. Their reference thereto is footnote 10. Also, (reading) "The act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported in interstate."

Of course, the feeling of counsel for the defendant is that this is the highest authority in the land and certainly is the authority which the defendant would have a right to rely on. I think clearly that the Government has not made a case as defined in this Supreme Court decision. It does not seem to me that any justice we could get on any other basic principle of law would justify a conviction in face of this opinion.

THE COURT: 922(h) is receipt. Title 18 designates the possession or receipt of a firearm by four classes of persons, one of whom is a person who is under indictment or who has been convicted in court of a felony. The last portion of the statute relates to firearms or ammunition

which has been shipped in [57] interstate or foreign commerce. This Court believes that it is bound by the opinion of the Sixth Circuit Court of Appeals in the case of the United States vs. Roy Ernest Day. With respect to the argument made by counsel, I would cite the language which appears at page 6 of the slip opinion. (reading) There can be no doubt that the Congress intended, and through its words accomplished, the regulation of unlicensed intrastate sales of firearms. Three other circuits have been asked to impose the language of Bass to 922(a)(1) and have found, as we do, that it is inapplicable.

I have no doubt in my mind that under the language of the Day case, the only thing this Court can do is to overrule the motion of the defendant and to hold that the United States in presenting its evidence, whether believed by the jury or not, separates the question by presenting evidence that the defendant is a person who has previously been convicted of a felony and who received the gun, which was established by the evidence, to have been manufactured in the state of Massachusetts, transported to the state of North Carolina and [58] then transported into the state of Kentucky and sold by the designated firearms dealer to the defendant.

MR. WELLS: I don't want to be labor it, but if I might, I would like to attempt to comment on the points the Court overruled. Counsel for the defendant, of course, acknowledges the authority cited by the Court to sustain its decision. However, counsel for the defendant does not think that the case which was cited by the Court is one which was handed down after the time of the alleged offense by this defendant. It does seem to me that the decision of the Court should be guided by what the best law period is to be at the time that this alleged offense was committed. If we are dealing in transactions which were handed down at a time later than that, we are in effect, in my opinion, dealing in something of a nature of pay no attention to the law. To me the language in the United States vs. Bass surely includes this type of a situation in the provision of 922(h).



MR. WEBB: First, I would say that Bass does not deal with 922(h) at all, it's a [59] 1202(a)(1) case. The interpretation of 922(h) is what we think is applicable to this case to the extent that it says what we have proved here and we have proven the movement of this fire arm in interstate right into the hands of this defendant.

(Discussion had off-record)
(The following discussion was had on record)

THE COURT: Let the record show that Mr. Wells for the defense has raised a question as to whether or not he will be permitted to argue the evidence introduced this far in the case to the jury, that the transaction amounted to nothing more than an intrastate transaction. The United States has responded indicating that this fact is subervious argument under the evidence introduced to this point and would likely mislead the jury about the issues in the case.

Mr. Wells, is that your view?

MR. WELLS: Yes, sir.

THE COURT: Mr. Webb, is that your view?

MR. WEBB: Yes, sir.

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON DIVISION

Criminal No. 10,339

[Filed June 19, 1973, Eastern District of Kentucky, at Lexington, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

PEARL BARRETT, DEFENDANT

NOTICE OF APPEAL

Take notice that Pearl Barrett of Booneville, Kentucky does by his attorney, Harold Garland Wells, P.O. Box 621, Hazard, Kentucky, appeal to the U. S. Court of Appeals for the 6th district from a judgment of this court entered in Pikeville, Kentucky on June 11, 1973 wherein he was sentenced to a term of three years on indictment no. 10,339 on the Jackson docket. The appellant, Pearl Barrett, by counsel further states that he was by the judgment herein above referred to sentenced to said term of three years on an indictment charging him with an offense prohibited by 18 USC 922(H) in that having been previously convicted of a felony by a Court of the Commonwealth of Kentucky, he did on April 1, 1972, knowingly receive and have in his possession a fire arm, to wit, a .32 caliber Smith and Wesson revolver, model 31-1, serial number H33141, which had been transported in interstate commerce.

Said Pearl Barrett, appellant herein, is presently being confined in the Pike County Kentucky Jail.

/s/ Harold Garland Wells
Attorney for Appellant



This will certify that true copies of the foregoing notice and attached designation were mailed postage prepaid to Eldon Webb, Assistant United States Attorney, Federal Building, Lexington, Kentucky this 18th day of June, 1973.

/s/ Harold Garland Wells
Attorney for appellant

Copies to:

U.S. Attorney
Clerk, Court of Appeals
6-19-73

/s/ M.R.H.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 73-1872

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

PEARL BARRETT, DEFENDANT-APPELLANT

---

Appeal from United States District Court
for the Eastern District of Kentucky

---

Decided and Filed October 18, 1974.

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Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, J. delivered the opinion of the Court, in which EDWARDS, J., joined. MCCREE, J. (pp. 9-12) filed a dissenting opinion.

WEICK, Circuit Judge. The indictment charged that appellant Barrett, having been convicted in the state court of a felony, housebreaking, knowingly received and had in his possession a firearm, towit, a .32 caliber Smith and Wesson revolver, which had been transported in interstate commerce, 18 U.S.C. § 922(h). He was tried and convicted by a jury and was sentenced to three years' imprisonment.

Barrett had purchased the revolver on April 1, 1972, in a Western Auto Store in Booneville, Kentucky. Western



Auto Store had received the gun on March 5, 1972 from Gastonia, North Carolina.

About one-half hour after Barrett had purchased the revolver he was observed by two deputy sheriffs driving his automobile south of Booneville. After the officers chased his car a short distance he stopped, and they arrested him for driving while intoxicated. One of the deputies then noticed the firearm on the floor board on the driver's side of Barrett's car; it was loaded.

Barrett had been convicted previously on January 17, 1967, of the housebreaking charge, and was sentenced to two years' imprisonment. On June 20, 1969, after Barrett served his sentence, the Governor of Kentucky signed a partial pardon restoring Barrett only to his civil rights.

Barrett contended in the District Court and here that his purchase of the firearm from the dealer was an intrastate transaction, not within the scope of Section 922 (h), and that, in any event the document which he received from the Governor of Kentucky constituted a full pardon and therefore his previous conviction had been wiped out.

## I

## THE STATUTE

Section 922(h) provides in relevant part:

> (h) It shall be unlawful for any person—
>
> (1) Who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This section is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

It would appear to us that under the Government's proof this statute has been literally complied with. The

firearm indeed had been transported in interstate commerce, from North Carolina to Kentucky, less than one month before Barrett received it.

Barrett relies on dictum contained in the majority opinion in *United States* v. *Bass*, 404 U.S. 336 at 342-343 (1971). *Bass* involved a prosecution under Title VII of the Omnibus Crime Control and Safe Streets Act, while the prosecution in the present case was under Title IV of the Act. The dictum is as follows:

> . . . [H]owever, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.[10]

Footnote 10 reads as follows:

> Title IV, 18 U. S. C. §§ 922(g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902(e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumtive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U.S. 463 (1943), and the Court there noted:
>
> "[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466. While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968). (404 U.S. at 343)



By reference to *Tot*, the complete sentence, of which the foregoing quotation is a part, is as follows:

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. (319 U.S. at 466).

The Court in *Tot* further said:

> The Government agrees that this construction is correct. (*Id.* at 466).

It therefore appears that the Government conceded that the construction of the statute by the lower courts was correct, and that the Supreme Court accepted the concession without discussion. In *Tot* all that the Court decided was that the presumptive provision in the Act was invalid.

In the present case the Government has made no such concession, and we are required to decide the issue. Footnote 10 in *Bass* recognized that "the reach of Title IV itself is a question to be decided finally some other day . . . ."[1]

It is our opinion that there is no ambiguity in Section 922(h) of the Act. It means exactly what it says.

Barrett did indeed receive a firearm which had been transported in interstate commerce. Such receipt violated the plain language of the statute. It was not necessary for the Government to prove that Barrett received the firearm from the common carrier.

---

[1] The dictum in *Bass* was discussed in our decision in *United States* v. *Craven*, 478 F.2d 1329, 1336 (6th Cir. 1973), where there had been a second and more recent transportation of the firearm in interstate commerce, which we held was sufficient to support a conviction under Section 922(h).

## II

## THE PARDON

It will be noted that Section 922(h) contains no exemption for any one who has been pardoned.

Barrett in the District Court relied on the exemption contained in 18 U.S.C. § 1203 Appendix, which appears in 18 U.S.C. § 3531 to End, page 496, and reads as follows:

> § 1203 Exemptions
>
> This title shall not apply to—
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

Section 1203 is part of Title VII of the Act and would not appear to apply to an indictment under Title IV of the Act. But if the exemption did apply, it would not help Barrett because the alleged pardon did not authorize him to receive the firearm.

The pardon reads as follows:

> To all to Whom These Presents Shall Come, Greeting:
>
> Whereas, It is represented to me that the conduct of PEARL BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.
>
> Now Know Ye, That in consideration of the premises and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT





> denied him in consequence of said judgment of conviction, and I direct that all officers of this State respect this restoration.
>
> In Testimony Whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20th day of June in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78th year of the Commonwealth.
>
> [SEAL]
>
> /s/ Louie B. Nunn
> By the Governor

All that the pardon purported to do was to restore "all civil rights lost by reason of conviction of a felony."

Section 77 of the Kentucky Constitution provides:

> He [the Governor] shall have the power to . . . commute sentences, grant reprieves and pardons, except in case of impeachment.

In *Herndon* v. *Commonwealth*, 105 Ky. 197 at 200 (1899), the Court quoted the following language taken from *Mount* v. *Com.*, 2 Duv., 93, with respect to a Section 77 pardon:

> The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more.

The civil rights to which Barrett was restored by the pardon were the right to suffrage provided for in Section 145 of the Kentucky Constitution, the right to hold public office as provided in Section 150 of the Constitution, and the right to serve on a jury, provided in K.R.S. 29.025. These constitutional and statutory provisions expressly state that their civil rights are restored by the pardon.

The differences between a pardon merely restoring civil rights and a pardon relieving a convict of the pen-

alty are pointed out in *Arnett* v. *Stumbo*, 287 Ky. 433, 435-436, 153 S.W.2d 889 (1941), where the Court stated:

> It will be perceived that persons losing their right of citizenship whereby they become disqualified to exercise the right of suffrage under the voters section "may be restored to their civil rights by executive pardon"; whilst the disqualification to seek and hold office under the office holding section "may be removed by pardon of the governor." There is no language in either of those sections expressly, inferentially or otherwise touching or dealing with a cancellation by any chief executive of the corporal punishment inflicted upon a convict for violation of any criminal law, the power to grant which is contained in Section 77 of our Constitution. The executive clemency provided for by both of the sections referred to (145 and 150) goes no farther than to permit the chief executive to restore lost rights of citizenship to the one convicted so that he might thereafter possess such rights as though no conviction had ever occurred. The rights so lost pertain exclusively to participation in the selection and the holding of a public office in the Commonwealth each of which is taken away by the sections of the Constitution referred to, but which may be restored by executive clemency as therein provided. Clearly, therefore, such restoration relates solely to the qualifications of those who seek and obtain public office within it.

The Court further said:

> . . . [The Governor] is expressly authorized by the sections referred to [Secs. 145 and 150] to lift the disabilities prescribed in them from the shoulders of the convict and to restore him to full and complete rights of citizenship. Such authority is in addition and supplementary to the strict pardoning power provided for by Section 77 of the same instrument. (287 Ky. at 437).



In *Illinois Cent. R.R.* v. *Bosworth*, 133 U.S. 92, 103 (1890), the Supreme Court stated the effect of a full pardon:

> In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . ."

In 67 C.J.S., *Pardons*, § 1(b), at 562-563, the several kinds of pardons are discussed:

> There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; it is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. (Footnotes omitted).

It is clear to us that the pardon in the present case was not a full pardon, but only a partial pardon. There was no remission of guilt, nor of the penalty. The only thing accomplished by the pardon was a restoration of civil rights under Kentucky law.

The rule of *United States* v. *Renner*, 496 F.2d 922 (6th Cir., 1974), should be confined to the facts of that case. The present case involved a question of Kentucky law relating to pardons, and appellant is bound by Kentucky law.

**Affirmed.**

McCREE, Circuit Judge (concurring in part and dissenting in part). I concur in that part of the court's opinion holding that appellant cannot avail himself of the exemption contained in 18 U.S.C. § 1203 Appendix, but only because that exemption is not available to a defendant tried for violation of 18 U.S.C. § 922(h). That exemption applies only to convicted felons charged with receipt of firearms contrary to 18 U.S.C. § 1202. Appellant was indicted under a similar statute, 18 U.S.C. § 922(h), also for receipt of a firearm. The exemption applicable to this offense, provided for in 18 U.S.C. § 925, requires a convicted felon who desires to acquire a firearm contrary to the provisions of § 922(h) to secure the express permission of the Secretary of the Treasury, not a gubernatorial pardon.

I respectfully dissent from that part of the court's opinion holding that the government established that appellant's purchase of the gun from a local dealer satisfied the interstate commerce requirement of 18 U.S.C. § 922(h). In *Tot* v. *United States*, 319 U.S. 463 (1943), the Supreme Court was presented with two cases that required it to construe and to determine the validity of the predecessor statute to section 922 which provided:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act. *Id.* at 464, *quoting* C. 850. 52 Stat. 1250, 1251; 15 U.S.C. § 902(f).

The Supreme Court observed in its opinion that two federal courts of appeals, including this court, had held that "the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which at some prior time, have been transported interstate." *Id.* at 466. The



Court adopted this construction as authoritative in order to determine the validity of the presumption that Congress had created in the second portion of the statute. It invalidated the presumption because there was "no rational connection between the fact proved [possession] and the ultimate fact [receipt in an interstate transaction] presumed. . . ." *Id.* at 467. Possession of a gun, the Court held, afforded "no reasonable ground for a presumption that its purchase or procurement was in interstate rather than intrastate commerce." *Id.* at 468. Because the Supreme Court in *Tot* authoritatively construed § 2(f) of the Federal Firearm Act, the predecessor to section 922(h), I believe that the phrase in section 922(h); "which has been shipped or transported in interstate or foreign commerce," must be construed in the same manner as the identical phrase, "which has been shipped or transported in interstate or foreign commerce," of section 2(f). Accordingly, I would hold, as the Supreme Court did in *Tot*, that the mere shipment of a weapon in interstate commerce at some time before purchase in an intrastate transaction is an insufficient nexus with interstate commerce to satisfy the requirements of section 922(h).

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Supreme Court reiterated that it had construed authoritatively section 2(f) in *Tot* and stated that section 922(h) "apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." *Id.* at 342-43. In *Bass*, the Court, in construing 18 U.S.C. § 1202(a), concluded that with respect to that statute "the Government meets its burden . . . if it demonstrates that the firearm received has previously traveled in interstate commerce," and observed that "this reading preserves a significant difference between the 'receipt' offenses under Title IV [containing section 922(h)] and Title VII [containing section 1202(a)]." *Id.* at 350, & n. 18. Moreover, the Court observed that the government had not demonstrated that Congress, in enacting section 922(h) in 1968, in language identical to that of section

2(f) of the Federal Firearms Control Act, had intended to change and broaden its earlier construction of this language in *Tot*. The government has also failed to offer in connection with this appeal any proof of a Congressional change of intent.

Not only has the Supreme Court indicated that the "receipt" offense of section 922(h) is more limited than that defined by section 1202(a), but also this court has adopted a similar construction. In *United States* v. *Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973), *reh. denied*, appellant contended that the government had failed to demonstrate receipt in violation of section 922(h). We observed that the Supreme Court's interpretation of the interstate character of the receipt requirement in *Bass* "comport[ed] with the accepted interpretation of the predecessor statutes of § 922(h)," and "conclude[d] that 18 U.S.C. § 922(h) speaks only of the receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." *Id.* at 1336. Applying this test, we affirmed the conviction because within a few days after the theft of a police officer's gun in Ohio, appellant was found in possession of it in Kentucky.

Finally, in *United States* v. *Ruffin*, 490 F.2d 557 (8th Cir. 1974), not cited by either party to this appeal, the court held that "for a receipt to be cognizable under § 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560. Accordingly, when the evidence showed only that a gun, found in appellant's possession in Missouri, had been stolen seven months earlier in Illinois from an interstate common carrier, appellant's conviction had to be reversed. The evidence was deemed insufficient to show that receipt of the gun was part of an interstate transportation.

When the Supreme Court authoritatively construes a statute, and Congress preserves its original language in enacting successor statutes, I believe that the scope of the statute's prohibition remains the same, in the absence of evidence that Congress intended identical language in a successor statute to mean something different from its



meaning in the original statute. In this case, appellant's purchase of the weapon was a purely intrastate transaction even though the gun had once been shipped in interstate commerce from the manufacturer to the dealer where it came to rest before it was sold to appellant. This evidence is insufficient to demonstrate the connection with interstate commerce required by 18 U.S.C. § 922(h). Accordingly, I would reverse appellant's conviction.

SUPREME COURT OF THE UNITED STATES

No. 74-5566, OCTOBER TERM, 1974

PEARL BARRETT, PETITIONER

*v.*

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition which reads as follows:

"1. Whether Title 18 U.S.C. Section 922 (h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm."

February 18, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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